



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA-R06-OAR-2011-0513; FRL-10021-41-Region 6]

Approval and Promulgation of State Air Quality Plans for Designated Facilities and Pollutants; New Mexico and Albuquerque-Bernalillo County, New Mexico; Control of Emissions From Existing Other Solid Waste Incineration Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is notifying the public that we have received CAA section 111(d)/129 negative declarations from New Mexico and Albuquerque-Bernalillo County, New Mexico, for existing incinerators subject to the Other Solid Waste Incineration units (OSWI) emission guidelines (EG). These negative declarations from New Mexico and Albuquerque-Bernalillo County, New Mexico, certify that incinerators subject to the OSWI EG and the requirements of sections 111(d) and 129 of the CAA do not exist within the jurisdictions of New Mexico and Albuquerque-Bernalillo County. The EPA is accepting the negative declarations and amending the agency regulations in accordance with the requirements of the CAA.

DATES: This rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2011-0513. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be

publicly available only in hard copy form. Publicly available docket materials are available either electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Karolina Ruan Lei, EPA Region 6 Office, Air and Radiation Division - State Planning and Implementation Branch, 1201 Elm Street, Suite 500, Dallas, TX 75270, (214) 665-7346, ruan-lei.karolina@epa.gov. Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office will be closed to the public to reduce the risk of transmitting COVID-19. Please call or e-mail the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

I. Background

On January 15, 2020, we published a direct final rule and accompanying proposed rule notifying the public that we had received CAA section 111(d)/129 negative declarations from New Mexico and Albuquerque-Bernalillo County for existing OSWI (85 FR 2316; 85 FR 2359). These negative declarations certify that existing OSWI subject to the requirements of sections 111(d) and 129 of the CAA do not exist within the specified jurisdictions in New Mexico. In the January 15, 2020, rulemakings, we proposed and finalized to accept the negative declarations and amend the Code of Federal Regulations (CFR) in accordance with CAA requirements. The direct final rule was published without prior proposal because we anticipated no adverse comments. We stated in the direct final rule that if we received relevant adverse comments by February 14, 2020, we would publish a timely withdrawal in the *Federal Register*. We received a relevant adverse comment on the direct final rule, and we withdrew the direct final rule on March 23, 2020 (85 FR 16270).

On September 28, 2020, we published a supplemental notice of proposed rulemaking (SNPRM) (85 FR 60746). The SNPRM supplemented the proposal published on January 15, 2020, where we proposed to notify the public that we received CAA section 111(d)/129 negative

declarations from New Mexico and Albuquerque-Bernalillo County, New Mexico, for existing OSWI; these negative declarations certify that existing OSWI subject to the requirements of sections 111(d) and 129 of the CAA do not exist within the specified jurisdictions in New Mexico. In order to reaffirm and clarify the prior negative declaration, New Mexico submitted a revised negative declaration for incinerators subject to the OSWI EG by letter dated June 15, 2020; this letter clarifies that incinerators (including OSWI and air curtain incinerators (ACI)) subject to the OSWI EG do not exist within its air quality jurisdiction. In the SNPRM, we appropriately expanded the inclusion of the facilities addressed in the negative declarations from New Mexico and Albuquerque-Bernalillo County from “existing OSWI” to “incinerators subject to the OSWI EG”. The term “incinerators subject to the OSWI EG” is more technically and legally accurate as all facilities affected by the OSWI EG are required to be addressed in state plans and negative declarations. The Albuquerque-Bernalillo County negative declaration letter that was submitted on December 13, 2006, appropriately addressed the subject facilities. Details on CAA sections 111(d) and 129, the OSWI EG, and the negative declarations submitted by New Mexico and Albuquerque-Bernalillo County, can be found in the September 28, 2020, supplemental proposal.

All comments received on the original proposal and on the supplemental proposal are addressed in this final rule. As detailed below, we received one comment on the direct final rule and accompanying proposed rule during the public comment period that closed on February 14, 2020.¹ No comments were received on the supplemental proposal during the comment period that closed on October 28, 2020. Our response to the comment received is presented below. After careful consideration of the comments, we have decided to finalize our action with no changes from the proposed action.

II. Response to Comment

¹ EPA Document ID No. EPA-R06-OAR-2011-0513-0001 (direct final rule) & EPA-R06-OAR-2011-0513-0002 (proposed rule).

Comment: The commenter stated that the EPA should not allow for negative declarations and should ensure the State of New Mexico has a regulation in place to control emissions from solid waste incineration units throughout the State. The commenter adds that even though the State says they do not have any units subject to this regulation, the EPA should require the State to develop and implement a regulation in case a new source is constructed in the State. The commenter asserts that sections 111(d) and 129 of the CAA require states to develop a regulation for the control of emissions from these units and, therefore, the EPA must require states to develop and implement a new regulation to control emissions from these units.

Response: We disagree with the commenter's statements that the EPA should not allow for negative declarations. Federal regulations at 40 CFR 60.23(b) and 62.06 specifically provide that if there are no existing sources of the designated pollutants in the state, the state may submit a letter of certification to that effect (i.e., a negative declaration) in lieu of a plan, which exempts the state from the 40 CFR part 60, subpart B, requirement to submit a CAA section 111(d)/129 plan.

We also disagree with the commenter's statements that the EPA should require the State to develop and implement a regulation in case a new source is constructed in the State. State plans under CAA section 111(d)/129 apply only to existing facilities. The designated facilities to which the OSWI EG (40 CFR part 60, subpart FFFF) apply are OSWI and certain ACI² that commenced construction on or before December 9, 2004, and were not modified or reconstructed on or after June 16, 2006, as specified in 40 CFR 60.2991 and 60.2992, with limited exceptions as provided under 40 CFR 60.2993. Any incinerator (OSWI or certain ACI)³ that commenced construction after December 9, 2004, or that commenced reconstruction or modification on or after June 16, 2006, would be subject to the OSWI New Source Performance

² The air curtain incinerators (ACI) subject to the OSWI EG at 40 CFR part 60, subpart FFFF, do not fit the definition of a "OSWI," as defined in the OSWI EG. See 40 CFR 60.2994(b) and 60.3078.

³ These OSWI and ACI are those incinerators described under the OSWI NSPS, codified at 40 CFR part 60, subpart EEEE, at 40 CFR 60.2977 and 60.2888(b). The incinerators to which the OSWI NSPS apply are specified in 40 CFR 60.2885 and 60.2886, with limited exceptions as provided under 40 CFR 60.2887.

Standards (NSPS) codified at 40 CFR part 60, subpart EEEE.⁴ The negative declarations for incinerators subject to the OSWI EG were submitted to the EPA by the New Mexico Environment Department (NMED) and the City of Albuquerque Environmental Health Department (AEHD) on June 15, 2020, and December 13, 2006, respectively. In addition, the EPA proposed revisions to the OSWI EG and NSPS on August 31, 2020 (85 FR 54178). When the EPA finalizes the revisions to the OSWI EG,⁵ each state (and air quality control jurisdiction) will need to submit a negative declaration or plan, as applicable, for those sources subject to the requirements of the final revised OSWI EG.

III. Final Action

In this final action, the EPA is amending 40 CFR part 62, subpart GG, to reflect receipt of the negative declaration letters from NMED and AEHD received on June 15, 2020, and December 13, 2006, respectively, certifying that there are no existing incinerators subject to 40 CFR part 60, subpart FFFF, in their respective jurisdictions in accordance with 40 CFR 60.23(b), 62.06, and 60.2982 and sections 111(d) and 129 of the CAA.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a CAA section 111(d)/129 submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7411(d); 42 U.S.C. 7429; 40 CFR part 60, subparts B and FFFF; and 40 CFR part 62, subpart A. With regard to negative declarations for designated facilities received by the EPA from states, the EPA's role is to notify the public of the receipt of such negative declarations and revise 40 CFR part 62 accordingly. For that reason, this action:

⁴ The NSPS are developed and implemented by the EPA and are delegated to the states. The OSWI NSPS (40 CFR part 60, subpart EEEE) are incorporated by reference in the New Mexico State regulations at 20.2.77 NMAC, *New Source Performance Standards*, and in the Albuquerque-Bernalillo County regulations at 20.11.63 NMAC, *New Source Performance Standards for Stationary Sources* (83 FR 46107, September 12, 2018; 80 FR 8799, February 19, 2015).

⁵ The court ordered deadline to promulgate the final OSWI review is May 31, 2021. *Sierra Club v. Wheeler*, 330 F. Supp. 3d 407. (D.D.C. 2018).

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

This rule also does not have Tribal implications because it will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal

Government and Indian Tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Waste treatment and disposal.

Dated: March 24, 2021.

David Gray,
Acting Regional Administrator, Region 6.

For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR part 62 as follows:

**PART 62 – APPROVAL AND PROMULGATION OF STATE PLANS FOR
DESIGNATED FACILITIES AND POLLUTANTS**

1. The authority citation for part 62 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart GG – New Mexico

2. Add an undesignated center heading and § 62.7893 to read as follows:

Emissions From Existing Other Solid Waste Incineration Units

§ 62.7893 Identification of plan—negative declarations.

Letters from the New Mexico Environment Department and the City of Albuquerque Environmental Health Department dated June 15, 2020, and December 13, 2006, respectively, certifying that there are no incinerators subject to the Other Solid Waste Incineration units (OSWI) Emission Guidelines, at 40 CFR part 60, subpart FFFF, within their respective jurisdictions in the State of New Mexico.